LIM SOK WAH v. LIM BOON CHEOW & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
LAU BEE LAN JCA
RAVINTHRAN PARAMAGURU JCA
[CIVIL APPEAL NOS: P-02(NCVC)(W)-2641-12-2018 &
P-02(NCVC)(A)-631-04-2019]
24 AUGUST 2021

SUCCESSION: *Administration of estates – Claims for distributive share – Deceased died intestate – Deceased entered agreements with beneficiaries declaring to give them each gift of monies prior to his death – Whether declaration of gift and agreements considered wills – Whether agreements had contractual effect – Whether gift of monies affected or displaced beneficiaries' claims to distributive share in subject property under deceased's intestacy – Whether beneficiaries entitled as of right to share in remaining two-thirds of intestate estate of deceased pursuant to s. 6(1)(e) of Distribution Act 1958*

There were two appeals which arose out of two High Court suits which were ordered to be heard together on appeal: Civil Appeal No P-02(NCVC)(W)-2641-12-2018 ('Appeal 2641') and Civil Appeal No P-02(NCVC)(A)-631-04-2019 ('Appeal 631'). Appeal 2641 and Appeal 631 were heard before different judges who gave contrary decisions, hence the appeals. Appeal 2641 was an appeal brought by the appellant, Lim Soh Wah, the plaintiff in the High Court against the decision of the High Court Judge ('HCJ') dismissing the plaintiff's claim and the decision was thereby held in favour of the first and second respondents, Lim Boon Cheow and Lim Boon Lin, the first and second defendants acting in their capacity as the administrators of the estate of Lim Theng Hoe ('deceased') in the High Court. Appeal 631 was an appeal brought by the appellants, Lim Boon Cheow and Lim Boon Lin, the first and second defendants acting in their capacity as the administrators of the estate of the deceased in the High Court against the decision of the HCJ allowing the claim of the respondent, Lim Shok Choo, the plaintiff in the High Court. The appellant in Appeal 2641 and the respondent in Appeal 631 were the lawful daughters and next-of-kin of the deceased who died intestate on 31 May 1988. They were both half-sisters. The respondents in Appeal 2641 and the appellants in Appeal 631 were the administrators of the estate of the deceased pursuant to the grant of letters of administration granted on 1 December 2011 and extracted on 24 March 2014. The subject matters in dispute in both appeals was a piece of property, which was listed as one of the assets in the grant of letters of administration ('the subject property'). The appellant in Appeal 2641 and the respondent in Appeal 631 were claiming a share of the subject property. The deceased had, on 18 May 1973, executed the declaration of gift (P2) intending to make a gift of the proceeds of sale

of his properties to all members of his family consisting of his two wives and his children. The properties involved two property estates which the deceased termed as the 'Lim Theng Hoe Estate (Balik Pulau)' and the 'Thye Aik 15 Estate'. The subject property was included in the Lim Theng Hoe Estate (Balik Pulau) and the appellant in Appeal 2641 and the respondent in Appeal 631 were members of the family listed in the document dated 18 May 1973. The deceased further entered into agreements dated 25 July 1973 (P3) with each of the appellant in Appeal 2641 and the respondent in Appeal 631 declaring to give each of them their gift of monies in the sum of RM11,857.15 respectively (1/7th of one equal share). The deceased executed an acknowledgment and declaration on 30 October 1975 (P5) declaring that he made payments to his family members, including the appellant in Appeal 2641 and respondent in Appeal 631 their gift of monies in the sum of RM11,857.15. Only the deceased as the maker solely signed the acknowledgment and declaration dated 30 October 1975. There were no signatures of any beneficiary. The factual difference between the two appeals was this: in Appeal 2641, the appellant's position was that she had not received the gift of monies in the sum of RM11,857.15 under the agreement dated 25 July 1973 and whether the appellant was paid or not was subject to proof. The respondent in Appeal 631 did not dispute having received the gift of monies in the sum of RM11,857.15. The appellant in Appeal 2641 and the respondent in Appeal 631 stood on common ground that (i) the declaration of gift dated 18 May 1973, the agreement dated 25 July 1973 and the acknowledgment and declaration on 30 October 1975 were not wills; and (ii) that the claims were claims for distributive share. Having taken this position, the appellant in Appeal 2641's position was her claim was not based on contract or tort. At the High Court, the decision of the judge in Appeal 2641 was (i) that the declaration of gift (P2), agreement dated 25 July 1973 (P3) and the acknowledgment and declaration dated 30 October 1975 were unambiguous and that it was the court's duty to give effect to the wordings of the documents; (ii) that it was untenable and a little too late for the plaintiff as the plaintiff was clearly time-barred to now dispute the payment of the sum of money promised or to claim that the agreement between her and the deceased was conditional on the sale of the properties; and (iii) that the plaintiff's reliance on s. 9 of the Distribution Act 1958 ('Distribution Act') was futile as the provision referred to a sum of money given for the advance of the child and that the sum of money in this case was given for a specific purpose and could not be said for the advancement of the plaintiff but for an undertaking that the plaintiff relinquished her rights over the property of the deceased. As for the decision of the judge in Appeal 631, it was held, *inter alia*, (i) that the 1973 agreement being an agreement in respect of a gift of monies from a father to his child was strictly a family private arrangement which conferred no obligations and rights that were legally binding or enforceable; (ii) that as the preamble in the 1973 agreement states that 'Lim Theng Hoe has expressed his desire to make a gift from the proceeds of sale of a property', the consideration, *ie*, that 'the donee

undertakes that she will not directly or indirectly disturb or interfere or obstruct the possession dealing or management or income or sale of any or all the properties belonging to the donor' was not a valid consideration as the plaintiff had no legal right or interest to interfere with the donor's property; (iii) that the consideration, *ie*, 'the donee shall have no more claim whatsoever and no more rights, interest or shares beneficial or otherwise in the said properties and shall not make any claim in respect of these properties under the estate of Lim Theng Hoe' was not a valid consideration, as the plaintiff had no rights whatsoever in the properties during the lifetime of the donor and that after the death of the donor his estate was governed by the Distribution Act; (iv) that the plaintiff as the beneficiary was entitled to have a share in the subject property pursuant to s. 6(1)(e) of the Distribution Act and that the law is settled in that the donor could not contract out the plaintiff's statutory right; (v) that as the purpose of the Distribution Act is to ensure that a beneficiary who is entitled to have a share in the estate is not left out and as there is no provision for waiver in the Distribution Act, cl. 2 of the 1973 agreement which sought to exclude the plaintiff's statutory right under the Distribution Act was against public policy in that it defeated the purpose of the Distribution Act, and as fortified by s. 9 of the Distribution Act; and (vi) that with regard to the issue of laches and limitation, the plaintiff's claim was grounded on her statutory right as spelt out in the Distribution Act, and that as the grant of letters of administration was granted to the respondents on 1 December 2011 and extracted on 24 March 2014, it was not correct to say that time starts to run from 1973, as in 1973, the plaintiff had no rights whatsoever to make any claim and no right to sue anyone. The issue that arose was whether the Distribution Act prevailed over any contractual agreement which affected the estate of a deceased who died intestate.

Held (allowing Appeal 2641; dismissing Appeal 631)
Per Lau Bee Lan JCA delivering the judgment of the court:

(1) In holding that the declaration of gift dated 18 May 1973, the agreements dated 25 July 1973 and the acknowledgment and declaration dated 30 October 1975 were 'unambiguous and that it is the court's duty to give effect to the wordings of the documents', the judge in Appeal 2641 had failed to appreciate that the cause of action of the appellant in Appeal 2641 was founded on the appellants' statutory right and entitlement as a beneficiary of the estate of the deceased to a distributive share in the subject property under the deceased's intestacy in accordance with the Distribution Act and not on contract or tort and certainly not on the agreements, in the case of Appeal 2641. The judge had failed to appreciate that the said agreements had no contractual effect, in that, they were no more than a family arrangement of the deceased which conferred no obligations and rights that were legally binding and enforceable and therefore gave rise to legal relations. Further, the administrators had no defence to the appellants' claim,

given that the deceased died intestate and the appellants, being beneficiaries of the estate of the deceased, that the subject property was part of the intestate estate of Lim Theng Hoe (deceased), and the express terms of the grant of the letters of administration. The appellants, being beneficiaries of the estate of the deceased who died intestate, leaving a spouse and 14 children, were entitled as of right to a share in the remaining two-thirds of the intestate estate of the deceased pursuant to s. 6(1)(e) of the Distribution Act. (paras 20, 21, 22 & 26)

(2) By the very express terms of the grant of letters of administration, the administrators were not only bound by the terms of the grant of letters of administration but also by the administration oath that they will 'administer the estate and effects of the deceased and distribute the residue of his estate and effects according to law' (see O. 71 r. 33 of the Rules of Court 2012 ('ROC')) and by the administration bond that they will 'administer according to law the moveable and immoveable property of the deceased' (O. 71 r. 34 of the ROC and s. 35 of the Probate and Administration Act 1959) the law being the law on intestacy under the Distribution Act. The judge in Appeal 631 was correct and there was no reason to disturb her finding that the plaintiff was a beneficiary and that the estate was to be distributed in accordance with the Distribution Act. As a beneficiary, the plaintiff was entitled to have a share in the subject property pursuant to s. 6(1)(e) of the Distribution Act as this was her statutory right. (paras 23 & 24)

(3) The agreements dated 25 July 1973 were not legally binding and enforceable. The deceased as donor had no legal obligation to effect the gift of money to the appellant or to any family members as donees from the notional proceeds of sale of the subject property which belonged to the deceased exclusively, a gift made gratuitously without the request of the appellants. The appellants as donees had no legal right to enforce the gift of money if not paid by Lim Theng Hoe as donor, as the so-called consideration 'not to disturb, interfere or obstruct the possession, dealing or management or income or sale of any of the properties' belonging to the donor, was not a valid consideration in that the appellants had no legal right or interest in the deceased's properties 'to disturb, interfere or obstruct the possession, dealing or management or income or sale' of the said properties, and that such consideration, if at all, was a consideration which the appellants were already obliged civilly or morally not to do. The appellants had no proprietary right or interest whatsoever in the said properties belonging to the deceased to enable the appellants to acknowledge and confirm 'that upon full payment of the gift or monies aforesaid they shall have no more claim whatsoever and no more rights, interests or shares beneficial or otherwise in the said properties'. As the appellants had no proprietary right or interest in the said properties during the lifetime of the deceased, the appellants would have no 'rights and shares in respect of these two

properties including the subject property to waive against the estate of the deceased in the event the 'properties are still not yet sold or transferred to another party', and more so under his intestacy. (para 28)

(4) The said agreements were not the last will and testament of the deceased and had no testamentary effect whatsoever. The agreements dated 25 July 1973 were not the last wills and testament of the deceased in the manner prescribed by the Wills Act 1959 ('Wills Act'). Section 5 of the Wills Act states that 'No will shall be valid unless it is in writing and executed in manner hereinafter mentioned'. Neither was there evidence of the deceased's testamentary intention in the absence of any 'effective testamentary disposition of any property of which the deceased owner is competent to dispose of by will'. The administrators were not in a position to dispute that none of the agreements provide any right or authority for them as administrators to distribute the subject property only to beneficiaries who had not received their gift of money from the deceased and to exclude the beneficiaries who had received the gift of money under their respective agreements with the deceased. (paras 31 & 34)

(5) The administrators' contention that the distribution of the subject property was limited 'only to the three beneficiaries who have entered into agreements with the deceased and have not yet received their full payment' went against the grain of the grant of letters of administration which included the subject property as part of the intestate estate of the deceased. The administrators of the deceased under his intestacy, were in no position to arrogate to themselves the right or authority to decide who, among the family members, should be entitled to share in the subject property, in disregard of their duty, oath and obligation under the grant of letters of administration, the Administration Oath and Administration Bond and the law on intestacy under the Distribution Act. By taking the position which they have taken with regard to the manner of administering the subject property, it clearly demonstrated that the administrators had misapprehended the law. In law and principle, the administrators obtained their authority solely from the grant of letters of administration and not from the three documents, none of which had any testamentary effect. (paras 36 & 37)

(6) The judge in Appeal 2641 in dismissing the claim of the appellant in Appeal 2641 had erred in holding that s. 9 of the Distribution Act is only concerned about the 'advancement of the child under normal circumstances will include for the needs of education and career'. The appellant in Appeal 2641 and the respondent in Appeal 631 submitted that the gift of money of RM11,857.15 (in the case of Appeal 2641, if received because she was disputing receipt of the said sum), that the agreements dated 25 July 1973 and the acknowledgment and

A Declaration dated 30 October 1975 had nothing to do with the needs of education or even career of the respective appellants, but rather it was plainly money 'paid, given or settled' to them by the deceased within the ambit of s. 9 of the Distribution Act. In the circumstances, the gift of monies by the deceased to the appellant in Appeal 2641 and the
B respondent in Appeal 631 did not affect or displace their claims to a distributive share in the subject property under the deceased's intestacy. (para 39)

(7) The appellant in Appeal 2641 and the respondent in Appeal 631 had no right or interest in the subject property to waive or relinquish during the
C lifetime of the deceased and that in the event of the deceased's death, their rights and interests in the subject property only arose upon the completion of the administration of the deceased's estate according to the law of intestacy as prescribed under the Distribution Act. The judge in Appeal 631 was correct in her approach in holding that the deceased
D could not contract out the statutory right and entitlement of the respondent in Appeal 631 under the deceased's intestacy or the Distribution Act and that the agreement dated 25 July 1973 was against public policy. (paras 43 & 44)

Case(s) referred to:

E *Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC* ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***

Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC ***(refd)***

F *Re Holmes; Holmes v. Holmes [1890] 62 LT 383* ***(refd)***

Re Tan Lian Boh, Deceased; Wee Sin Choe & Anor v. The Official Assignee & The Attorney-General [1951] 1 LNS 76 ***(refd)***

Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v. Tan Saw Keow & Ors [1951] 1 LNS 77 HC ***(refd)***

G *Re: Estate Of Teoh Cheow Choon; Ex parte: Khor Hong Luang [1994] 4 CLJ 575 HC* ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 26(a)

Distribution Act 1958, ss. 6(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), 9

Probate and Administration Act 1959, ss. 31, 35, 60(3), (4)(a), 68

Rules of Court 2012, O. 71 rr. 33, 34

H Wills Act 1959, s. 5

Other source(s) referred to:

Tristram And Coote's Probate Practice, 24th edn, 1973, p 173

Williams, Mortimer And Sunnucks On Executors, Administrators And Probate, 16th edn, 1960, pp 491, 957, 960

I

(Civil Appeal No: P-02(NCVC)(W)-2641-12-2018)
For the appellant - M Thayalan & Chong Jun Min; M/s JA Yeoh
For the respondents - Ghazi Ishak, B Jeyasingam & Moses Mathew George; M/s Ghazi & Lim

(Civil Appeal No: P-02(NCVC)(A)-631-04-2019)
For the appellants - Ghazi Ishak, B Jeyasingam & Moses Mathew George; M/s Ghazi & Lim
For the respondent - Tan Beng Hong & Lim Shin Lid; M/s Khoo Keat Siew & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan JCA:

Introduction

[1] There are two appeals before us which arose out of two High Court suits which were ordered to be heard together on appeal. They are:

(i) Civil Appeal No. P-02(NCVC)(W)-2641-12-2018 ("Appeal 2641") which stems from the High Court Suit No: PA-22NCVC-227-11-2017; and

(ii) Civil Appeal No. P-02(NCVC)(A)-631-04-2019 ("Appeal 631") which stems from the High Court Originating Summons No: PA-24-NCVC-690-08-2018.

[2] Appeal 2641 and Appeal 631 were heard before different judges who gave contrary decisions, hence the appeals.

[3] Appeal 2641 is an appeal brought by the appellant, Lim Soh Wah, the plaintiff, in the High Court against the decision of the learned High Court Judge dismissing the plaintiff's claim and the decision was thereby held in favour of the first and second respondents, Lim Boon Cheow and Lim Boon Lin, the first and second defendants acting in their capacity as the administrators of the estate of Lim Theng Hoe (deceased) in the High Court.

[4] Appeal 631 is an appeal brought by the appellants, Lim Boon Cheow and Lim Boon Lin, the first and second defendants acting in their capacity as the administrators of the estate of Lim Theng Hoe (deceased) in the High Court against the decision of the learned High Court Judge allowing the claim of the respondent, Lim Shok Choo, the plaintiff in the High Court.

[5] Having considered the written submissions and having heard the oral submissions of the respective counsel representing the parties in both the appeals, in our considered view there is one primary issue in both appeals. The issue is whether the Distribution Act 1958 (Act 300) prevails over any contractual arrangement which affects the estate of a deceased who dies intestate.

A **Salient Facts**

[6] The facts stated herein are applicable to both appeals unless otherwise stated. The appellant in Appeal 2641 and the respondent in Appeal 631 are the lawful daughters and next of kin of Lim Theng Hoe (deceased) who died intestate on 31 May 1988. They are both half-sisters.

B

[7] The respondents in Appeal 2641 and the appellants in Appeal 631 are the administrators of the estate of Lim Theng Hoe (deceased) pursuant to the grant of letters of administration granted under Penang High Court Petition No. 44-277-1988 on 1 December 2011 and extracted on 24 March 2014.

C **[8]** The subject matters in dispute in both appeals is property, Lot No. 220, Mukim 4, Daerah Barat Daya, Penang held under Grant No. 18350 which is listed as one of the assets in the grant of letters of administration ("the subject property").

[9] The appellant in Appeal 2641 and the respondent in Appeal 631 are
D claiming a share of the subject property.

[10] The deceased had on 18 May 1973 executed the declaration of gift (P2) intending to make a gift of the proceeds of sale of his properties to all members of his family consisting of his two wives and his children. The
E properties involved two property estates which the deceased termed as the "Lim Theng Hoe Estate (Balik Pulau)" and the "Thye Aik Estate". The subject property is included in the Lim Theng Hoe Estate (Balik Pulau) and the appellant in Appeal 2641 and the respondent in Appeal 631 are members of the family listed in the document dated 18 May 1973.

F **[11]** The deceased further entered agreements dated 25 July 1973 (P3) with each of the appellant in Appeal 2641 and the respondent in Appeal 631 declaring to give each of them their gift of monies in the sum of RM11,857.15 respectively (1/7 of one equal share).

[12] The deceased executed an acknowledgment and declaration on
G 30 October 1975 (P5) declaring that he made payments to his family members, including the appellant in Appeal 2641 and respondent in Appeal 631 their gift of monies in the sum of RM11,857.15. Only the deceased as the maker solely signed the acknowledgment and declaration dated 30 October 1975. There were no signatures of any beneficiary.

H **[13]** The factual difference between the two appeals is this: in Appeal 2641, the appellant's position is that she had not received the gift of monies in the sum of RM11,857.15 under the agreement dated 25 July 1973 and whether appellant is paid or not is subject to proof. The respondent in Appeal 631 did not dispute having received the gift of monies in the sum of
I RM11,857.15.

[14] The appellant in Appeal 2641 and the respondent in Appeal 631 stand on common ground that:

(i) the declaration of gift dated 18 May 1973, the agreement dated 25 July 1973 and the acknowledgment and declaration on 30 October 1975 are not wills; and

(ii) that the claims are claims for distributive share. Having taken this position, the appellant in Appeal 2641's position is her claim is not based on contract or tort.

High Court Decisions

[15] Briefly, the decision of the learned judge in Appeal 2641 is as follows:

(i) that the declaration of gift (P2), agreement dated 25 July 1973 (P3) and the acknowledgment and declaration dated 30 October 1975 are unambiguous and that it is the court's duty to give effect to the wordings of the documents;

(ii) that it is untenable and a little too late for the plaintiff as the plaintiff is clearly time-barred to now dispute the payment of the sum of money promised or to claim that the agreement between her and the deceased is conditional on the sale of the properties; and

(iii) that the plaintiff's reliance on s. 9 of the Distribution Act 1958 ("Distribution Act") is futile as the provision refers to a sum of money given for the advance of the child and that the sum of money in this case was given for a specific purpose and cannot be said for the advancement of the plaintiff but for an undertaking that the plaintiff relinquishes her rights over the property of the deceased.

[16] Briefly, the decision of the learned judge in Appeal 631 is as follows:

(i) that the 1973 agreement being an agreement in respect of a gift of monies from a father to his child is strictly a family private arrangement which confers no obligations and rights that are legally binding or enforceable;

(ii) that as the preamble in the 1973 agreement states that "Lim Theng Hoe has expressed his desire to make a gift from the proceeds of sale of a property", the consideration, ie, that "the donee undertakes that she will not directly or indirectly disturb or interfere or obstruct the possession dealing or management or income or sale of any or all the properties belonging to the Donor" is not a valid consideration as the plaintiff has no legal right or interest to interfere with the donor's property;

(iii) that the consideration, ie, "the donee shall have no more claim whatsoever and no more rights, interest or shares beneficial or otherwise in the said properties and shall not make any claim in respect of these properties under the estate of Lim Theng Hoe" is not a valid

consideration, as the plaintiff has no rights whatsoever in the properties during the lifetime of the donor and that after the death of the donor his estate is governed by the Distribution Act see the case of *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1997] 3 MLJ 188 at p. 189;

(iv) that the plaintiff as the beneficiary is entitled to have a share in the subject property pursuant to s. 6(1)(e) of the Distribution Act and that the law is settled in that the donor cannot contract out the plaintiff's statutory right (see the case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805 at p. 820;

(v) that as the purpose of the Distribution Act is to ensure that a beneficiary who is entitled to have a share in the estate is not left out and as there is no provision for waiver in the Distribution Act, cl. 2 of the 1973 agreement which sought to exclude the plaintiff's statutory right under the Distribution Act is against public policy in that it defeats the purpose of the Distribution Act, and as fortified by s. 9 of the Distribution Act; and

(vi) that with regard to the issue of laches and limitation, the plaintiff's claim is grounded on her statutory right as spelt out in the Distribution Act, and that as the grant of letters of administration was granted to the respondents on 1 December 2011 and extracted on 24 March 2014, it is not correct to say that time starts to run from 1973, as in 1973, the plaintiff has no rights whatsoever to make any claim and no right to sue anyone.

Our Decision

[17] We shall for ease of reference for purposes of this portion of the judgment, refer to the respondents in Appeal 2641 and the appellants in Appeal 631 as the administrators as and when it is appropriate.

[18] The contents of the two agreements dated 25 July 1973 are the, same, save for the parties, namely, between the deceased and his daughters, the appellant in Appeal 2641 and the respondent in Appeal 631 and their respective signatures in the said agreements.

[19] The crux of the present appeals stems from the construction to be, accorded to the disputed cl. 2 in the agreements dated 25 July 1973. For context, cl. 1 states as follows:

> 1. In consideration of the sum of RM11,857.15 only to the Donee, the Donee confirms and undertakes that she or her agents, servants or workman will not directly or indirectly disturb, interfere or obstruct the possession, dealing or management or income or sale of any or all of the properties belonging to the Donor.

Further, cl. 2 states as follows: A

> 2. The Donee further acknowledges and confirms that upon full payment of the gift of monies aforesaid, she shall have not more claim whatsoever and no more rights, interests or shares beneficial or otherwise in the said properties above mentioned known as Lim Theng Hoe Estate (Balik Pulau) and Thye Aik Estate and if upon the death of the Donor, the said two properties are still not yet sold or transferred to another party, the Donee shall not make any claim in respect of these two properties under the Estate of Lim Theng Hoe and shall be deemed to have waived all her rights and shares in respect of these two properties. B

[20] In holding that the declaration of gift dated 18 May 1973, the agreements dated 25 July 1973 and the acknowledgment and declaration dated 30 October 1975 are "unambiguous and that it is the court's duty to give effect to the wordings of the documents", the learned judge in Appeal 2641, in our judgment, had failed to appreciate that the cause of action of the appellant in Appeal 2641 is founded on the appellants' statutory right and entitlement as a beneficiary of the estate of the deceased to a distributive share in the subject property under the deceased's intestacy in accordance with the Distribution Act and not on contract or tort and certainly not on the agreements, in the case of Appeal 2641. C D

[21] Further, we find as it was correctly submitted by the appellant in Appeal 2641 and the respondent in Appeal 631, that the administrators have no defence to the appellants' claim, given that Lim Theng Hoe (deceased) died intestate and the appellants, being beneficiaries of the estate of Lim Theng Hoe (deceased), that the subject property is part of the intestate estate of Lim Theng Hoe (deceased), and the express terms of the grant of the letters of administration. E F

[22] The undisputed facts are that the appellants, being beneficiaries of the estate of Lim Theng Hoe (deceased) died intestate, leaving a spouse and 14 children, are entitled as of right to a share in the remaining two-thirds of the intestate estate of the deceased pursuant to s. 6(1)(e) of the Distribution Act. G

[23] We find by the very express terms of the grant of letters of administration, the administrators are not only bound by the terms of the grant of letters of administration but also by the administration oath that they will "administer the estate and effects of the deceased and distribute the residue of his estate and effects according to law" (see O. 71 r. 33 of the Rules of Court 2012) and by the administration bond that they will "administer according to law the moveable and immoveable property of the deceased" (see O. 71 r. 34 of the Rules of Court 2012 and s. 35 of the Probate and Administration Act 1959 (Act 97) ("Probate and Administration Act"), the law being the law on intestacy under the Distribution Act. H I

[24] In light of our findings above, we therefore find the learned judge in Appeal 631 was correct and there is no reason to disturb her finding that: "The plaintiff is a beneficiary. The estate is to be distributed in accordance, with the Distribution Act 1958 (the Act). As a beneficiary, the plaintiff is entitled to have a share in the subject property pursuant to s. 6(1)(e) of the Act). This is her statutory right".

[25] In response to the argument above, the administrators submitted, that it is inequitable and unconscionable of the appellant in Appeal 2641 and the respondent in Appeal 631 to make such a claim whilst the agreements dated 25 July 1973 are in force, and as the administrators are aware of the agreements dated 25 July 1973, they must act in a manner consistent with those 1973 agreements. By reason of what we have stated above, coupled with other reasons which we shall discuss below, we find there is no merit whatsoever in the contention of the administrators.

[26] In holding that the declaration of gift dated 18 May 1973, the, agreements dated 25 July 1973 and the acknowledgment and declaration dated 30 October 1975 are "unambiguous and that it is the court's duty to give effect to the wordings of the documents", the learned judge in Appeal 2641, in our judgment, had failed to appreciate that the said agreements had no contractual effect in that they are no more than a family arrangement of the deceased which confers no obligations and rights that are legally binding and enforceable and therefore give rise to legal relations.

[27] Counsel for the administrators disagreed with the position taken by the appellant in Appeal 2641 and the respondent in Appeal 631 and instead submitted (i) the fact the three agreements were executed with signatures showed that the documents were intended to have legal effect; (ii) the acknowledgment and declaration dated 30 October 1975 was ten witnessed by a practising solicitor and stamped; and (iii) these agreements were made on account of natural love and affection, enforceable under s. 26(a) of the Contracts Act 1950.

[28] In our considered opinion, there is no merit in the submission of the administrators that the three agreements are legally binding and enforceable. We make some observations: the acknowledgment and declaration dated 30 October 1975 was not stamped. If at all, it was only the agreements dated 25 July 1973 that were stamped and respectively had the signature of a solicitor. The declaration of gift dated 18 May 1973 was solely signed by Lim Theng Hoe (deceased). We hold that the agreements dated 25 July 1973 are not legally binding and enforceable for the following reasons canvassed by the appellant in Appeal 2641 and the respondent in Appeal 631:

(i) Lim Theng Hoe (deceased) as donor had no legal obligation to effect the gift of money to the appellant or to any family members, as donees from the notional proceeds of sale of the subject property which belonged to the deceased exclusively, a gift made gratuitously without the request of the appellants;

(ii) the appellants as donees had no legal right to enforce the gift, of money if not paid by Lim Theng Hoe as donor, as the so-called consideration "not to disturb, interfere or obstruct the possession, dealing or management or income or sale of any of the properties" belonging to the donor, is not a valid consideration in that the appellants had no legal right or interest in the deceased's properties "to disturb, interfere or obstruct the possession, dealing or management or income or sale" of the said properties, and that such consideration, if at all, is a consideration which the appellants were already obliged civilly or morally not to do;

(iii) the appellants had no proprietary right or interest whatsoever in the said properties belonging to Lim Theng Hoe (deceased) to enable the appellants to acknowledge and confirm "that upon full payment of the gift or monies aforesaid they shall have no more claim whatsoever and no more rights interests or shares beneficial or otherwise in the said properties"; and

(iv) as the appellant had no proprietary right or interest in the said properties during the lifetime of Lim Theng Hoe (deceased), the appellants would have no "rights and shares in respect of these two properties including the subject property to waive against the estate of Lim Theng Hoe (deceased) in the event the "properties are still not yet sold or transferred to another party", and more so under his intestacy.

[29] In light of what we have stated above, we find the learned judge in Appeal 631 was justified in finding that (i) the consideration "that she (donee) or her agents servants or workman will not directly or indirectly disturb, interfere or obstruct the possession, dealing or management or income or sale of any or all of the properties belonging to the donor" is not a valid consideration as "the plaintiff has no legal right or interest to interfere with the donor's property"; and (ii) the second consideration that "she shall have no more claim whatsoever and no more rights, interests or shares beneficial or otherwise in the said properties and shall not make any claim in respect of these two properties under the estate of Lim Theng Hoe" is not a valid consideration in that the appellant has no rights whatsoever or interests in the properties during the lifetime of the deceased.

[30] Counsel for the administrators submitted that:

(i) the learned judge was correct in holding that the appellant in Appeal 2641 and the respondent in Appeal 631 was bound by the agreements dated 25 July 1973 which are worded in clear and unambiguous terms and it was the court's duty to give effect to the said agreements after citing several authorities;

(ii) the appellant in Appeal 2641 and the respondent in Appeal 631 having admitted to have signed the agreements dated 25 July 1973 were bound by the terms of the said agreements notwithstanding their alleged ignorance of the terms citing *Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ 127 (HC) at p. 147 F-I;

(iii) there was no error on the part of the learned judge as he found the payment of RM11,857.15 from the deceased was in exchange for the promises by the appellant in Appeal 2641 and the respondent in Appeal 631, ie, the payment was reciprocated with their promises as consideration; and

(iv) based on cl. 2 of the agreements dated 25 July 1973, the appellant in Appeal 2641 and the respondent in Appeal 631 (i) promised to abstain from making any claim in respect of the subject property under the estate; and (ii) they shall be deemed to have waived all their rights and shares in respect of the subject property.

[31] With respect, we were unable to agree with the aforesaid submissions of the administrators. In holding that the declaration of gift dated 18 May 1973, the agreements dated 25 July 1973 and the acknowledgment and declaration dated 30 October 1975 are "unambiguous and that it is the court's duty to give effect to the wordings of the documents", the learned judge, in our judgment, had failed to appreciate that the said agreements are not the last will and testament of the deceased and had no testamentary effect whatsoever. We find that the agreements dated 25 July 1973 are not the last wills and testament of Lim Theng Hoe (deceased) in the manner prescribed by the Wills Act 1959 (Act 346) ("Will Act"). Section 5 of the Wills Act states that "No will shall be valid unless it is in writing and executed in manner hereinafter mentioned". Neither do we find there is evidence of the deceased's testamentary intention in the absence of any "effective testamentary disposition of any property of which the deceased owner is competent to dispose of by will" (see para. [70.646], *Halsbury's Laws of Malaysia*, vol. 4, Wills, Probate, Administration and Succession).

[32] What is pertinent is that none of the contentions of the Administrators, including the contention that the agreements dated 25 July 1973 are binding on the appellant in Appeal 2641 and the respondent in Appeal 631 affect their statutory rights and entitlements under the Distribution Act, nor do they displace the law on intestate succession under the Distribution Act or affect or qualify the grant of letters of administration.

[33] In para. [70.645], *Halsbury's Laws of Malaysia*, vol. 4, Wills, Probate, Administration and Succession, the learned author states that "the rules of intestate succession are laid down by statute and govern the distribution of

the estates". In the present appeals, the applicable law is the Distribution Act, particularly, s. 6(1) which provides for the manner provided therein in sub-paras. (a) to (i) after payment of the expenses of due administration.

[34] Section 31 of the Probate and Administration Act provides:

> 31. Every person to whom administration of the estate of a deceased person is granted shall, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.

In light of this provision, the respondents in Appeal 2641 and the appellants in Appeal 631 are in no position to dispute that none of the agreements provide any right or authority for them as administrators to distribute the subject property only to the beneficiaries who had not received their gift of money from the deceased and to exclude the beneficiaries who had received the gift of money under their respective agreements with the deceased.

[35] The manner in how the administrators intend to administer the subject property is evident from Q&A 24 of the witness statement of the Lim Boon Lin, one of the administrators which reads as follows:

> A24: (a) Based on the documents available to us, there are three beneficiaries of my father's Estate who did not enter into agreements with my father namely Lim Boon Cheow, Lim Sock Dee and Lim Seok Eng.
>
> (b) There are three other beneficiaries who have entered into agreements with my father and were not fully paid by my father namely The Kiang Gnym (deceased), Lim Boon Sai and myself.
>
> (c) *As administrators of the Estate, on the basis that the beneficiaries who have entered into agreements with my father have a contractual claim over Lot 220 and they have priority over the other beneficiaries of my father's estate under his intestacy, we will administer and distribute Lot 220 to only the three beneficiaries who have entered into agreements with my father and have not yet received their full payment under the agreements.*
>
> (emphasis added)

[36] In our judgment, the administrators' contention that the distribution of the subject property is limited "only to the three beneficiaries who have entered into agreements with the deceased and have not yet received their full payment" goes against the grain of the grant of letters of administration which includes the subject property as part of the intestate estate of Lim Theng Hoe (deceased). As counsel for the appellant in Appeal 2641 and the respondent in Appeal 631 correctly submitted, the respondents in Appeal 2641 and the appellants in Appeal 631 as administrators of Lim Theng Hoe (deceased) under his intestacy, are in no position to arrogate to themselves the right or authority to decide who, among the family members, should be entitled to

share in the subject property, in disregard of their duty, oath and obligation under the grant of letters of administration, the administration oath and administration bond and the law on intestacy under the Distribution Act.

[37] By taking the position which they have taken with regard to the manner of administering the subject property as we have alluded to above, it clearly demonstrated that the administrators have with respect misapprehended the law. In this regard we are in agreement with the submission of the appellant in Appeal 2641 and the respondent in Appeal 631 as follows:

(i) That in law and principle, the administrators obtain their authority solely from the grant of letters of administration and not from the three documents, none of which has any testamentary effect. We rest on the following excerpts taken from *Halsbury's Laws of Malaysia*, vol. 4, Wills, Probate, Administration and Succession:

> [70.245] Meaning of 'administrator' An administrator[1] is a person appointed by a court of competent jurisdiction to administer the property of a deceased person. The office of administrator is said to be dative, because it derives from such a grant[2] whereas the office of executor[3] derives from the will of the deceased person[4].";
> and
>
> [70.277] Source of administrator's title Any personal representative[1] who is not an executor is an administrator[2]. And Administrator is a person who obtains his authority solely form the grant of letters of administration[3] and to whom representation of the deceased is committed by the Court[4].
>
> Every person to whom administration of the estate[5] of a deceased person is grated will, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in the same as if he were the executor of the deceased[6].

In *Re: Estate Of Teoh Cheow Choon; Ex parte: Khor Hong Luang* [1994] 4 CLJ 575, the primary issue was whether bearing in mind the grant of probate with will annexed had been issued to the executor and bearing in mind the provisions of s. 60(3) of the Probate and Administration Act, the application of the executrix was unnecessary and superfluous. What is relevant for the purpose of the present appeal is the following view at p. 577 expressed by the learned judge which we endorse:

> An administrator is a person who obtains his authority solely from the grant of Letters of Administration and to whom representation of the deceased is committed by the court in default of an executor. His office resembles that of an executor but, since he has not been selected by the deceased, he is, in general, obliged to give a bond with sureties for the due performance of his duties which (in regard to immovable property) he could perform only with the sanction of the court, by way

of an application for leave to distribute or transfer. As he derives his authority and powers only from the court, s. 60(4) of the Probate and Administration Act 1959, provides that he cannot without previous permission of the court;

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situated in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

(ii) That in law and principle, "total intestacy arises where the deceased has made no effective disposition of any of his property even though there may be a will" as stated in *Williams, Mortimer And Sunnucks On Executors, Administrators And Probate*, 16th edn, 1960 p. 960 and that "a testator cannot deprive those who are by law entitled to his estate by words of exclusion only, If he has failed to do this by disposing of his whole property, they are entitled to their share under the law of succession in an intestacy" as stated in *Tristram And Coote's Probate Practice*, 24th edn, 1973 at p. 173.

Further, in *Re Holmes; Holmes v. Holmes* [1890] 62 LT 383 where the English High Court held as follows:

The general rule of law which is beyond all question is so consistent with common sense that is cannot possibly be doubled. A testator cannot deprive those who are by law entitled to his estate by words of exclusion only ... The same rule applies, and has been held to apply again and again, in the case of the next of kin who take in succession to him by law except by making a will and disposing of the property to somebody else. If he does not do that, the next of kin have, by law, the right or succession to his personal estate.

Re Holmes; Holmes v. Holmes, (*supra*) was referred in *Re Tan Lian Boh, Deceased; Wee Sin Choe & Anor v. The Official Assignee & The Attorney-General* [1951] 1 LNS 76; [1951] 1 MLJ 187 at p. 189.

(iii) That in law, contractual rights based upon personal considerations do not devolve in that the executor's right to enforce a contract does not extend the contractual rights of the deceased and that the rights of the next-of-kin of an intestate and the rules of distribution of the estate are prescribed by statute namely, the Distribution Act (see *Williams, Mortimer And Sunnucks On Executors, Administrators And Probate*, 16th edn, 1960, pp. 491 and 957).

(iv) That in law, the residuary estate of the intestate is distributed in the manner prescribed under the Distribution Act and that the moveable and immoveable property are held upon trust by the personal representatives of a person intestate. Authority for the same is found in s. 68 of the Probate and Administration Act and *Williams, Mortimer And Sunnucks On Executors, Administrators And Probate*, 16th edn, 1960, p. 957.

(v) That in law, the immoveable property of a person who dies intestate may be disposed of without the previous permission of the court, whereas the property of a person who dies testate may be disposed of in any manner the executor may think proper subject to the imposition of any restriction by the will of the deceased as provided respectively under s. 60(4)(a) and s. 60(3) of the Probate and Administration Act. The same principle was adopted by the Federal Court in *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571; [2008] 4 MLJ 31 at p. 52 para. [28].

[38] This brings us to a consideration of s. 9 of the Distribution Act which expressly provides that "no money or other property which the intestate may during his life had paid, given or settled to or for the advancement of the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share".

[39] With respect we are of the view that the learned judge in Appeal 2641 in dismissing the claim of the appellant in Appeal 2641 had erred in holding that s. 9 of the Distribution Act is only concerned about the "advancement of the child under normal circumstances will include for the needs of education and career". Counsel for the appellant in Appeal 2641 and respondent in Appeal 631 submitted that the gift of money of RM11,857.15 (in the case of Appeal 2641, if received because she is disputing receipt of the said sum), that the agreements dated 25 July 1973 and the acknowledgment and declaration dated 30 October 1975 had nothing to do with the needs of education or even career of the respective appellants, but rather it is plainly money "paid, given or settled" to them by the deceased within the ambit of s. 9 of the Distribution Act. In the circumstances, we are of the view that the gift of monies by Lim Theng Hoe (deceased) to the appellant in Appeal 2641 and respondent in Appeal 631 do not affect or displace their claims to a distributive share in the subject property under the deceased's intestacy.

[40] In light of what our discussion above, in our view, the submission of counsel for the administrators that the arguments of the appellant in Appeal 2641 and the respondent in Appeal 631 were misplaced as the administrators were legally obliged to observe and recognise the legal force of the agreements dated 25 July 1973 cannot be sustained.

[41] The administrators argued that from the wordings of cl. 2 of the agreements dated 25 July 1973, it is evident the disputed waiver operates after the death of the deceased in the event the deceased fails to dispose of the subject property before his death. The administrators further submitted that the disputed waiver clause is valid and enforceable against the appellant in Appeal 2641 and the respondent in Appeal 631. The administrators relied on *Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v. Tan Saw Keow & Ors*

[1951] 1 LNS 77; [1951] 1 MLJ 21. In this case, the issue was whether the agreement containing a waiver/renunciation signed by some of the beneficiaries before the death of the deceased as reproduced was a contract and binding on the signatories of the document:

> We the undersigned relatives of Tan Soh Sim do hereby renounce all claims of whatsoever nature to the assets of Tan Soh Sim should she die intestate. This renunciation of our claims is in favour of the (the four adopted Chans and Boey Kee, the other widow in manner following ...

Counsel for the administrators themselves acknowledged that the Court of Appeal held that the document was void for want of consideration and that the element of "love and affection" and "near relation" under s. 26(a) of the Contract Ordinance were not satisfied. However, despite that, counsel for the administrators argued on the authority of *Tan Soh Sim* (*supra*), that the payment of RM11,857,15 is good consideration made for the promise of waiver and/or renunciation of their rights and share by the appellant in Appeal 2641 and the respondent in Appeal 631 in the subject property and is therefore binding and enforceable against them.

[42] In our view, *Tan Soh Sim* (*supra*) rendered no assistance to the administrators as the Court of Appeal in that case held that there was no contract for various reasons:

> To summarise then, the intestate was domiciled in Perak; this disputed instrument was an unilateral undertaking to renounce by way of gift; it was not signed by the donees; it was not a mutual agreement between signatories; it was not an effective assignment binding the administrator; it was not an agreement between the signatories and the donees either by way of compromise of doubtful rights or for natural love and affection between them.

[43] In addition, counsel for the appellant in Appeal 2641 and respondent in Appeal 631 submitted that the said appellant and the said respondent had no right or interest in the subject property to waive or relinquish during the lifetime of the deceased and that in the event of the deceased's death, their rights and interest in the subject property only arise upon the completion of the administration of the deceased's estate according to the law of intestacy as prescribed under the Distribution Act. We were in total agreement with their legal arguments as it was held by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1997] 3 MLJ 188 at p. 189 (MLJ) that:

> It could be concluded that in law, a beneficiary under an intestacy has not interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

[44] The learned judge in Appeal 631 was mindful of this legal principle and the said Federal Court authority of *Chor Phaik Har* (*supra*). Further, we find that the learned judge in Appeal 631 was right in her approach when she cited the Supreme Court case of *Kimlin Housing Development Sdn Bhd* (*supra*) in holding that Lim Theng Hoe (deceased) could not contract out the statutory right and entitlement of the respondent in Appeal 631 under the deceased's intestacy or the Distribution Act and that the agreement dated 25 July 1973 was against public policy. The learned judge quoted the following passage from *Kimlin Housing Development Sdn Bhd* as follows:

> The question whether a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound and the latter can effectively contract out of performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting waiver and contracting out. *Trietel on Contract* (at p 782) has correctly pointed out:
>
> > Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (*quilibet potest renunciare juri pro se introducto*), difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

In applying the law to the facts of the case, the learned judge aptly found as follows:

> To me, the purpose of the Distribution Act is to ensure that a beneficiary who is entitled to have a share in the estate is not left out. There is no provision for waiver in the Distribution Act. This being the case, the plaintiff could not contract out of the Distribution Act. Clause 2 of the 1973 agreement which sought to exclude the plaintiff's statutory right under the Distribution Act is against the public policy because it defeats the purpose of the Distribution Act. This is fortified by section 9 of the Act ...

Conclusion

[45] Premised on all the foregoing reasons we were unanimously of the view that there was merit in Appeal 2641 which warranted appellate intervention. However, for Appeal 631, we did not find that the learned judge was plainly wrong in law or fact for the court to exercise appellate intervention. In the circumstances we made the following decisions and orders in respect of the two appeals:

Appeal 2641:

(i) the appeal is allowed;

(ii) prayer 29(i) of the amended statement of claim is allowed ie, a declaration that the plaintiff as a beneficiary of the estate of Lim Theng Hoe, deceased under his intestacy is entitled to a share in the subject property known as Lot No. 220, Mukim 4, Daerah Barat Daya, Penang held under Geran No. 18350;

(iii) the decision of the High Court dated 14 December 2018 is hereby set aside; and

(iv) costs of RM50,000 here and below to be borne the estate of the deceased subject to payment of allocatur.

Appeal 631:

(i) the appeal of the appellants is dismissed;

(ii) the decision of the High Court dated 18 March 2019 is hereby affirmed; and

(iii) costs of RM10,000 to be borne by the estate of the deceased subject to payment of allocatur.